

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	Case No. 99A00031
)	
DARSHAN, INC., D/B/A DUNKIN)	Marvin H. Morse
DONUTS,)	Administrative Law Judge
Respondent.)	

ORDER GRANTING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT
(August 5, 1999)

I. Procedural History

On May 15, 1998, the Immigration and Naturalization Service (INS or Complainant) served a Notice of Intent to Fine (NIF) on Darshan, Inc., d/b/a Dunkin Donuts (Respondent) via certified mail.¹ On June 9, 1998, Raj Patel and Respondent's counsel, Krista L. Rowe, Esq.,² filed an Answer to the NIF and a Notice of Entry of Appearance with the INS. The Answer included a written request for a hearing before an administrative law judge (ALJ).

On April 2, 1999, the INS filed its three-Count Complaint against Respondent in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint seeks a total civil money penalty of \$7,500 and requests that a cease and desist order issue.

Count I of the Complaint alleges that Respondent failed to prepare/retain/present for inspection the employment eligibility verification forms (Forms I-9) for thirteen named individuals in violation of 8 U.S.C. § 1324a(a)(1)(B), assessing a civil money penalty of \$3,900 (\$300 per violation).

¹ The NIF was mailed by INS on May 12, 1998, via certified mail, return receipt, to Respondent. The attached copy of the return receipt delivered to INS shows that the NIF was served on Respondent May 15, 1998.

² The Notice of Entry of Appearance and Answer to the NIF list both Krista L. Rowe (Rowe) and Michael E. Piston of Michael E. Piston, P.C., 4000 Livernois, Suite 110, Troy, Michigan 48098, as counsel for Respondent. Filings by counsel confirm, however, that Rowe was the principal attorney before INS and Office of the Chief Administrative Hearing Officer.

Count II of the Complaint alleges that Respondent failed to properly complete Section 2 of the employment eligibility verification forms (Forms I-9) for eight named individuals in violation of 8 U.S.C. § 1324a(a)(1)(B), assessing a civil money penalty of \$2,400 (\$300 per violation).

Count III of the Complaint alleges that Respondent failed to ensure that four named individuals properly completed Section 1 and failed to properly complete Section 2 of the employment eligibility verification forms (Forms I-9) in violation of 8 U.S.C. § 1324a(a)(1)(B), assessing a civil money penalty of \$1,200 (\$300 per violation).

On April 6, 1999, OCAHO issued a Notice of Hearing (NOH) which transmitted a copy of the Complaint to Respondent. The second paragraph of the NOH stated,

The Respondent has the right to file an Answer to the Complaint. The Respondent's Answer must be filed within thirty (30) days after receipt of the attached Complaint. (This required Answer is in addition to any Answer filed in response to the Notice of Intent to Fine issued by the INS.)

The fourth paragraph of the NOH: (a) cautioned Respondent that failure to file an Answer to the Complaint within thirty days of receipt may be deemed a waiver by Respondent of its right to appear and contest the allegations of the Complaint; and (b) warned Respondent that the ALJ may enter a judgment by default and appropriate relief for failure to file a timely Answer to the Complaint. The sixth paragraph of the NOH informed that OCAHO considered the filing of the request for hearing in the Answer to the NIF by Rowe as her notice to appear on behalf of Respondent in this case.

In an April 7, 1999, letter addressed to Rowe, the Chief Administrative Hearing Officer (CAHO) confirmed that Rowe was considered to have entered an appearance on behalf of Respondent in this case before OCAHO. The letter also stated that if Rowe desired to withdraw from representing Respondent, she would need to file a motion with the ALJ requesting permission to withdraw. No such motion was received.

On April 9, 1999, Respondent's counsel received a copy of the NOH and attached Complaint, as confirmed by the Postal Service certified mail, return receipt, delivered to this Office. To date, neither Respondent nor its counsel of record has filed an Answer to the Complaint.

On May 19, 1999, INS filed a Motion for Default Judgment, including a Declaration of

Counsel Kathleen L. Alcorn, a Declaration of Special Agent Joseph T. Gillett,³ and attachments. INS requests that Respondent be found in default for failure to plead or otherwise defend within thirty days after service of the Complaint. The Certificate of Service attached to the Motion indicates service on both Respondent and Respondent's counsel.

On May 20, 1999, INS filed a Motion for Approval of Complainant's Proposed Civil Monetary Penalty Amounts with a Memorandum of Points and Authorities attached. Complainant supports its aggravated penalty amount request by contending that Respondent lacks good faith and that Respondent's violations are serious. To date, neither Respondent nor its counsel has responded to the Complaint and the two INS motions.

On June 2, the Order To Show Cause Why Default Judgment Should Not Issue was mailed to both Respondent and its counsel by certified mail, return receipt requested, and first class mail.⁴ The Order To Show Cause provided Respondent the opportunity to explain its failure timely to answer the Complaint and invited Respondent to show cause why a final decision and order should not be issued against it in the amount and for the reasons specified in the Complaint. Respondent was to file its response not later than June 21, 1999. Respondent received the certified mail copy on June 5, 1999, as evidenced by the return receipt delivered to this office. The copies sent by first class mail have not been returned to this office by the Postal Service. To date, no response to this Order has been filed.

II. Discussion

A. Respondent Is in Default

Respondent's failure to file a timely Answer to the Complaint constitutes a waiver of Respondent's right to contest the allegations set forth in the Complaint and, in this instance, results in the entry of a judgment by default. 28 C.F.R. §§ 68.9 (a), (b) (1999). Although Respondent and its counsel submitted to the INS an Answer in response to the NIF, this Answer to the NIF is not an answer to a complaint as required under 28 C.F.R. § 68.9. As stated in the NOH, the Respondent's **"required Answer is in addition to any Answer filed in response to the Notice of Intent to Fine issued by the INS."** NOH, at ¶ 2 (emphasis added). Thus, it was made clear to Respondent and Respondent's counsel that an Answer to the Complaint must be filed. Nothing has been filed by Respondent or Respondent's counsel with OCAHO.

³ The June 2, 1999, Order To Show Cause Why Default Judgment Should Not Issue incorrectly referenced Special Agent Gillett as Special Agent "Gilbert."

⁴ The copy of the Order addressed to Rowe on June 2, 1999, via certified mail, return receipt, was returned to this office for the stated reason that it lacked sufficient postage. The Order was readdressed and mailed to Rowe via certified mail, return receipt, on June 8, 1999. Although the return receipt has not been received by OCAHO, the letter is deemed served on Rowe because the Postal Service has not returned the letter to OCAHO.

As explained in both the NOH and the April 7, 1999, letter sent by the CAHO directly to Rowe, as Respondent's counsel, Rowe is considered to have entered an appearance on behalf of Respondent in these proceedings. All documents included in the case record were served on both Respondent and Rowe. Having not sought withdrawal from representation of Respondent in this matter, Rowe was obligated to respond to the Complaint, INS Motions, and Order To Show Cause. Rowe has not filed anything with OCAHO on behalf of Respondent in this matter. Additionally, Respondent has not acted in its own behalf to prevent default. Respondent has not been in contact with the ALJ's office nor filed anything in response to the Complaint, INS Motions, or Order To Show Cause.

Whether Respondent is in default depends on whether Respondent or its counsel received proper notice of the Complaint, *i.e.*, was the NOH, the Complaint, and Order To Show Cause properly served on Respondent and/or Respondent's counsel. It is clear that both Respondent and Respondent's counsel were properly served with the NOH, Complaint, and Order To Show Cause, as evidenced by the certified mail, return receipts, delivered to OCAHO, showing signature and date of receipt. In addition, because the copies of the NOH with Complaint attached and Order To Show Cause sent via first class mail were not returned to this office by the Postal Service, these copies are deemed to have been received by and served on Respondent and Respondent's counsel. Therefore, because Respondent and Respondent's counsel were properly served with the NOH, Complaint, and Order To Show Cause, Respondent is in default.

B. Civil Penalty Assessment Is Within Statutory Parameters

The Complaint demands a civil money penalty of \$7,500. Under 8 U.S.C. § 1324a(e)(5), Respondent is required "to pay a civil penalty in an amount of not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred." The penalties sought by Complainant of \$300 per individual violation are within the statutory limit. In addition, Complainant supports aggravation of penalty amounts over the \$100 statutory minimum per violation in its Motion filed May 20, 1999. Because Respondent defaulted and failed to contest the penalties demanded, I find the total fine in the amount of \$7,500 to be lawful.

III. Findings of Fact and Conclusions of Law

- (1) Respondent was properly served with the Notice of Hearing, Complaint, and Order To Show Cause;
- (2) Krista L. Rowe, Esq., of Michael E. Piston, P.C., 4000 Livernois, Suite 110, Troy, Michigan, 48098, is Respondent's Attorney of Record in this action;
- (3) Respondent's counsel, Krista L. Rowe, Esq., was properly served with the Notice of Hearing, Complaint, and Order To Show Cause;

- (4) Respondent is in default, having not responded to the Notice of Hearing, Complaint, and Order To Show Cause;
- (5) Respondent abandoned its request for hearing;
- (6) Respondent violated 8 U.S.C. § 1324a(a)(1)(B) as set forth in Counts I, II, and III of the Complaint;
- (7) Respondent is ordered to pay Complainant a total civil money penalty in the amount of \$7,500;
- (8) Respondent is ordered to cease and desist from violating 8 U.S.C. § 1324a; and
- (9) Complainant's Motion for Default Judgment and Motion for Approval of Complainant's Proposed Civil Money Penalty Amounts are granted.

SO ORDERED.

Dated and entered this 5th day of August, 1999.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order Granting Complainant's Motion for Default Judgment were sent via certified mail, return receipt requested as indicated, and first class this 5th day of August, 1999, addressed as follows:

Counsel for Complainant

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